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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-194

In Proceedings Under Chapter X
Nos. 10184-PH and 10762-PH

In the Matter of
WONDERBOWL, INC., a California corporation,
WONDERBOWL-DOWNEY, INC., a California corporation,
Debtors.

JAMES L. FALLON,
Petitioner,

vs.

SAM JONAS, Trustee, and H. J. CARUSO, BRUNSWICK CORPORATION, ALVIN S. BENNETT, SHELDON L. POLLACK, LEONARD S. SANDS and SEYMOUR ZUCKER,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition of James L. Fallon for writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the judgment of that Court en-

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tered in this proceeding April 4, 1975, and a judgment denying a petition for rehearing entered May 29, 1975, respectfully shows:

I.

Opinions Below.

The order (no opinion written) of the District Court is attached hereto as Appendix 1, page 1. The opinion of the United States Court of Appeals for the Ninth Circuit filed April 4, 1975, is attached hereto as Appendix 2, page 4. Attached hereto as Appendix 3, page 7, is the order of the United States Court of Appeals for the Ninth Circuit denying rehearing after the petition for rehearing and suggestion of appropriateness of rehearing *in bank* had been timely filed.

II.

Jurisdiction.

The judgment of the Court of Appeals was entered April 4, 1975. An order denying petition for rehearing was entered May 29, 1975. The jurisdiction of this Court is invoked under 28 USCA Section 1254(1) and Section 2101(c).

III.

Questions Presented.

A. Is the United States Court of Appeals held to any standard at all in its decisions and opinions? If it is held to a standard, is the standard similar to that imposed on the United States District Courts which requires that the District Court in its findings cover all elements of a case, that they be reasonably informative so that the reviewing Court may know the basis of the decision, that the findings be based upon a correct prin-

ciple of law and that the findings be not clearly erroneous? Stated another way, is the Court of Appeals entitled to write a cryptic, uninformative opinion that primarily states only that the court below is affirmed or reversed or sometimes not even that?

B. Can the provisions of Chapter X of the Bankruptcy Act (11 USCA) be so construed and administered as to evade the procedural requirements of Chapter X and thereby defeat the right of creditors and stockholders to accept or reject a plan of reorganization by calling a plan of reorganization "compromises", "sales", and a "lease" all of which was decided and adjudged at the same time without submission to the stockholders and creditors (11 USCA, §§ 567, 569, 570, 574, 575, 579, 580, 603, 606, 616, 621)?

C. In a proceeding under Chapter X where the plan of reorganization is in the guise of two compromises, two sales and a long-term lease and the same trustee represents two debtor estates having conflicting interests one of which said debtor estates is damaged by the plan and is used solely to effect the plan, may the Court approve such plan and the compromises, sales and lease without first appointing a separate trustee for the damaged debtor estate in order that the shareholders and creditors of that debtor estate and their interests may be heard by the Court?

D. Where there are two debtor estates both represented by the same trustee and the same counsel for the trustee and the effect of the plan of reorganization in the guise of two compromises, two sales and a leasehold creates a claim of one debtor estate against the other, may the District Court approve such plan without first determining the extent of the claim of the one

debtor estate against the other in order that the shareholders of the claimant debtor estate may know what they are giving up or what they are entitled to?

E. Where the District Court refuses to determine the interests as between two debtor estates until after the plan in the guise of two compromises, two sales and a long-term lease is concluded and therefore in connection with the order before this Court the rights of the respective shareholders and debtors have not been determined, may this Court permit such a judgment or order to stand?

F. Many an order approving two compromises, two sales and a lease which has the effect of completely liquidating the debtors in Chapter X, if concluded, be permitted to stand where the tax effect on the debtor estates will be such that the entire return, if any, to the debtor estates will be destroyed unless it can be truthfully determined that there is something to distribute to the shareholders, thereby satisfying 26 USCA § 337 (Internal Revenue Code § 337)?

G. May the District Court order complete liquidation of two debtor estates without considering in the manner required by Chapter X two filed plans of reorganization?

H. May a settlement and compromise of a pending case be authorized and approved without the consent and joinder of indispensable parties to the action?

IV.

Statutes Involved.

This case involves the construction of provisions of Chapter X of the Bankruptcy Act found in Title 11 USCA, and one section of the Internal Revenue Code

found in Title 26 USCA. The sections are specifically indicated in the foregoing statement of issues and the sections involved are set out verbatim in Appendix 4, page 8, attached hereto.

V.

Statement of Material Facts.

A. The Opinion of the Court of Appeals.

The cryptic opinion of the Court of Appeals in this case simply ignores important issues concerning the interpretation of the reorganization provisions of Chapter X of the Bankruptcy Act. It declines to consider the proper interpretation of Section 337, Internal Revenue Code, and its effect on the debtor estates before the Court. It similarly rejects the opinion of another circuit precisely on point and which would have required reversal in this case (*In re Solar Manufacturing Corporation,* 176 F.2d 493 (CCA3 1949)) and by the very cryptic nature of the opinion in fact does not indicate why it affirmed the trial court. To say that petitioners attempt to characterize the compromises, sales and lease ". . . as the plan is a failure" says nothing particularly when it is followed by the non-illuminating statement that "these agreements are precisely what they purport to be—sales, a lease, and compromises". Assuming *arguendo* that they are "agreements", "compromises" and "lease" this does not mean that together they do not constitute a plan of reorganization and liquidation. Together they constitute a plan. We asked the Court to decide whether such liquidation or plan of reorganization denying to shareholders and creditors alike the right to participate under the Bankruptcy Act was proper. That is totally ignored. The Court of Appeals for the Ninth Circuit in this case has

assumed a major role in destroying the two debtor estates here involved. This was not done intentionally but simply by the use of such cryptic, uninformative, unreasoning opinions. We invite this Court's attention to the following:

Caruso Enterprises v. A. J. Bumb, Trustee, 424 F.2d 178 (CCA9 1970);

Caruso Enterprises, Inc. v. A. J. Bumb, 456 F. 2d 954 (CCA9 1972);

In re Wonderbowl, Inc., 460 F.2d 1220 (CCA9 1972);

In the Matter of Wonderbowl, Inc., Debtor, Union Bank v. George T. Goggin, No. 71-2337 (CCA9 1973) [a copy of the opinion in this case is attached as Appendix 5, page 24];

In re U.S.A. Motel Corporation, 450 F.2d 499 (9th Cir. 1971).

Appendix 5 touched off two applications for writ of mandate, literally days of Court time and effort, reams of written argument and untold hours of the time of counsel because of its cryptic nature. A thorough correct opinion would have avoided 90% of this waste.

B. Bankruptcy Act Facts.

Wonderbowl is a corporation in reorganization under Chapter X. Wonderbowl-Downey is a separate corporation under reorganization under Chapter X. These two debtor proceedings were consolidated. Each owns its own assets. Each has its own liabilities. Each has one thing in common and that is an action against one Caruso, and his corporate entities for an accounting to recover assets and other relief. The problem between these

two estates is that funds and assets of Wonderbowl-Downey were used to fund assets acquired by Wonderbowl. These assets included certain land which can be referred to as the 21.3 acres. Also Wonderbowl with credit of Wonderbowl-Downey acquired a bowling alley property with a bowling alley on it. The issue of the interest and the accountings to be had are issues in the plenary action against Caruso and his enterprises.

The debtor estate of Wonderbowl-Downy is not in jeopardy. It has sufficient assets and income to maintain itself. The 21.3 acres is a part of the debtor estate of Wonderbowl and that land is mortgaged to Union Bank which desires to foreclose, but is restrained. Caruso or his enterprises claim a substantial third mortgage on the 21.3 acres and the validity of that mortgage is one of the issues in the plenary action. Wonderbowl-Downey's interest in the 21.3 acres lies in the fact that certain of its assets resulted in the acquisition of the 21.3 acres by Wonderbowl. The only way that this inherent conflict could be resolved would be by a plan of reorganization such as that of plan proponents which proposes that the debtors be merged, that the plan proponents fund the merged corporation with sufficient assets to take care of the Union Bank and to proceed with the litigation against Caruso and his enterprises.

The plan of plan proponents was filed at the specific request of the trustee of the two debtor estates as a result of an order directing the trustee to submit plans of reorganization. A determination that reorganization was not only feasible but desirable had already been made by the Court and the trustee.

The shareholders and creditors were notified that the trustee intended to reorganize the debtors and

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that the trustee would submit a plan of reorganization. Although the trustee filed the plan of plan proponents no steps were taken under Chapter X and no plan was submitted to the shareholders and creditors.

The Union Bank sought to foreclose its first trust deed on the 21.3 acres. This was refused by the District Court on the ground that it appeared that there could be a plan of reorganization and that the Union Bank was adequately secured. On an application for writ of mandate, the Court of Appeals rejected the petition of Union Bank and hence the restraint against foreclosure continued.

Notwithstanding the fact that the grounds of the restraint were that the debtors could be reorganized and a plan of reorganization and amended plan of reorganization was filed accordingly, the Court refused to hold a plan hearing under 11 USCA, § 569 (Bankruptcy Act § 169).

Instead of proceeding with the plan of reorganization under the provisions of the Bankruptcy Act the trustee entered into a compromise with Caruso and his enterprises on behalf of both debtors without sergegating the interests of each. The trustee also entered into compromises with Brunswick which had made certain claims concerning the leasing of the bowling alleys and the sale of one of the bowling alleys to Brunswick and the lease of the other. This was all done without any segregation or determination of the respective rights of the debtors. The circumstances were such that except for the fact that Caruso would not settle unless both settled and compromised, it was not worth while for Wonderbowl-Downey to have compromised since its position was such that it could carry on the litigation against Caruso and had everything to gain and nothing

to lose by it. If the 21.3 acres were lost that was an asset of Wonderbowl and it was the one which had something to gain or lose. The District Court refused to recognize this conflict.

The District Court has refused to give any notice of any kind of the plan of reorganization of plan proponents in spite of the fact that this plan has been filed and must be acted upon. The trustee has refused to give any notice of the existence of the plan of the plan proponents. In fact, the notice of the hearing on the report of the Referee and Special Master directed to all shareholders, creditors, debtors and those requesting notice carefully avoids any mention of the plan of plan proponents. As far as the shareholders, creditors, debtors and others were concerned, most of them knew of no alternative. There is no indication in the notices that the District Court complied with any of the provisions of Chapter X, nor is there anything in the notice that would even suggest that a plan of reorganization had been filed and that a plan hearing should have been held or that the creditors and shareholders alike had a right to vote upon the plan. Instead, the only notice given is to the general effect that a hearing would be had on the report of the Referee and Special Master with respect to the compromises, sales and lease. The effect of the notices was to prevent people from appearing and stating their position and objections since they had theretofore been assured by the record and the notices that the trustee would proceed with reorganization under Chapter X. Virtually none of the shareholders and Creditors appeared in opposition.

C. Tax Facts.

The Court of Appeals refused to consider the facts and lack of findings on the facts applicable to the sup-

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posed tax exemption found in Title 26 USCA § 337. No determination was made as to whether or not § 337 required a determination or consent to dissolution by the boards of directors of the respective debtors. No determination was made as to whether the Court could decree a dissolution within the meaning of § 337 and no decree ordering dissolution was made. No determination was made as to whether or not there would be any assets for distribution to the shareholders of Wonderbowl in view of the obligations of Wonderbowl to Wonderbowl-Downey. Thus the key to whether or not the exemption existed under § 337 was never found or determined by the Court of Appeals nor are there any findings of the District Court to support a § 337 exemption. This is the cornerstone of the recommendation of the trustee and the determination by the District Court that it should proceed on the two compromises, sales and lease method of liquidating this estate. No plan of liquidation was adopted. If there is no exemption, and we believe there can be none, then the tax consequences when added to the mortgage liens of the property in the hands of Wonderbowl will be such that the entire debtor estate will be wiped out and nothing will be left for Wonderbowl or Wonderbowl-Downey or any of the shareholders or creditors of either debtor. These matters are not even discussed by the Court of Appeals although presented to it. They are not determined in the sense of findings of fact necessary for determination in the findings of the District Court. There is no way that the Court of Appeals could have determined whether or not the District Court's decision was clearly erroneous or not clearly erroneous without these determinations.

D. Jurisdiction of Court of First Instance.

The jurisdiction of the Court of First Instance (United States District Court, Central District of California) lies in the fact that both of the debtor estates are applications for reorganization under the provisions of Chapter X of the Bankruptcy Act (11 USCA Chapter X).

VI.

Argument in Support of Writ.

A. The Supervisory Authority of This Court Is Required.

In recent years the Court of Appeals, particularly for the Ninth Circuit, has fallen into the habit of writing the kind of cryptic opinions which we have mentioned in foregoing parts of this petition. We can imagine nothing more important to the orderly development of the law and the practice of lawyers than adequate opinions properly written covering the issues involved. The Federal Rules of Civil Procedure have specific requirements in that connection for District Courts. Either the Court of Appeals does not consider itself bound by such standards or it simply failed to follow them. In any event, we consider that it is of the utmost importance that this Court review the standards which should be imposed upon the Courts of Appeals so that counsel advising clients may have some idea of what to expect in the event of litigation. This is not possible with the kind of opinion which we have described in the foregoing parts of this petition. The result is confusion, unnecessary litigation and when litigation does develop a proliferation of proceedings and time consuming effort which is a total waste. In the public announcements of Mr. Chief Justice Burger it has been

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stated that one of the problems of the court system is the lack of competent trial counsel. With that we heartily agree. The other side of this coin, however, is the lack of adequate opinions upon which trial counsel may rely. Such opinions are difficult to write. They are time consuming but the court in the interest of haste should not sacrifice quality. The competence and quality of advocacy and the competence and quality of the bench go hand in hand. One cannot exist without the other or the other without the first. We suggest that a good start would be in this case to grant the petition and consider the woefully inadequate opinion of the Court of Appeals.

We would also like to suggest that the Court has now gone through a period of some thirty years in which it has laid down guidelines primarily for State courts in criminal matters. In large measure, this Court has not turned its attention either to civil cases or to the Federal courts. Supervision in that area we suggest is just as important as in the State court systems.

B. Important Questions Are Presented for Determination.

Chapter X of the Bankruptcy Act was intended to provide participation by shareholders and creditors. One of the great virtues of this reorganization system has always been that it is possible to not only affect by a reorganization secured and unsecured debts alike, but this requires consent by both shareholders and creditors. As a result a logical, complete and adequate system has been established by Chapter X and in particular the sections of Chapter X which are set out verbatim in Appendix 4, page 8. In order to avoid the procedures set down by the statutes, some District Courts in some circuits have taken to exercising their supposed powers

of compromise, sale or lease as a means of *de facto* reorganization without the necessity of submitting the matter to the shareholders and creditors and without the necessity of a plan hearing or all of the other procedures intended to benefit and protect both shareholders and creditors alike. Thus the entire process of Chapter X is defeated and the estate is in effect closed up the same way as though the proceeding were a straight bankruptcy under Chapters 1 through 7 but this defeats the purposes of Chapter X and the intent and will of Congress.

This has led to a clear-cut conflict between circuits which is clearly recognized by the Ninth Circuit in this opinion and in this opinion the Court has even provided us with the cases in conflict.

The leading case supporting the proposition that the Court cannot and must not defeat Chapter X by liquidation is the decision of the Third Circuit.

> *In re Solar Manufacturing Corporation,* 176 F.2d 493 (CCA3 1949).

Arrayed against this case are the following Ninth Circuit cases:

> *In re Equity Funding, etc.,* 492 F.2d 793 (CCA9 1974);
>
> *In re Wonderbowl, Inc.,* 424 F.2d 178, 180 (CCA9 1970).

A determination is not only needed because this is an important and essential area of bankruptcy practice but also there is now a conflict between Circuits. One of the important benefits of Chapter X is the fact that it extends nationwide. A company whose business extends beyond a Circuit which files a Chapter X pro-

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ceeding will find that the rights of its shareholders will depend upon the Circuit in which it files. This Court should not permit such an unfortunate result.

C. Interpretation of 26 USCA § 337.

We have set out § 337 in Appendix 4, page 8. This section of the Internal Revenue Code provides for a complete plan of liquidation and liquidation within a 12-month period. The section is in fact consensual and requires a determination by the board of directors of a corporation. The precise bankruptcy-tax problem presented to this Court is whether or not this consensual act can be performed by the trustee in bankruptcy or the bankruptcy court without regard to the wishes of the board of directors or the shareholders of the corporation. We say that no such liquidation, particularly in Chapter X, should be ordered without at least the participation of the shareholders. To do so creates a plan of liquidation or plan of reorganization, if you will, without the consent of the shareholders.

A reasonable interpretation of § 337 also is that if no assets are to be distributed to the shareholders of the corporation then the exemption does not apply and in this case the estate of Wonderbowl would be destroyed.

We have been unable to find cases which precisely cover the matters in issue here and this is a matter of great importance in many Chapter X bankruptcies.

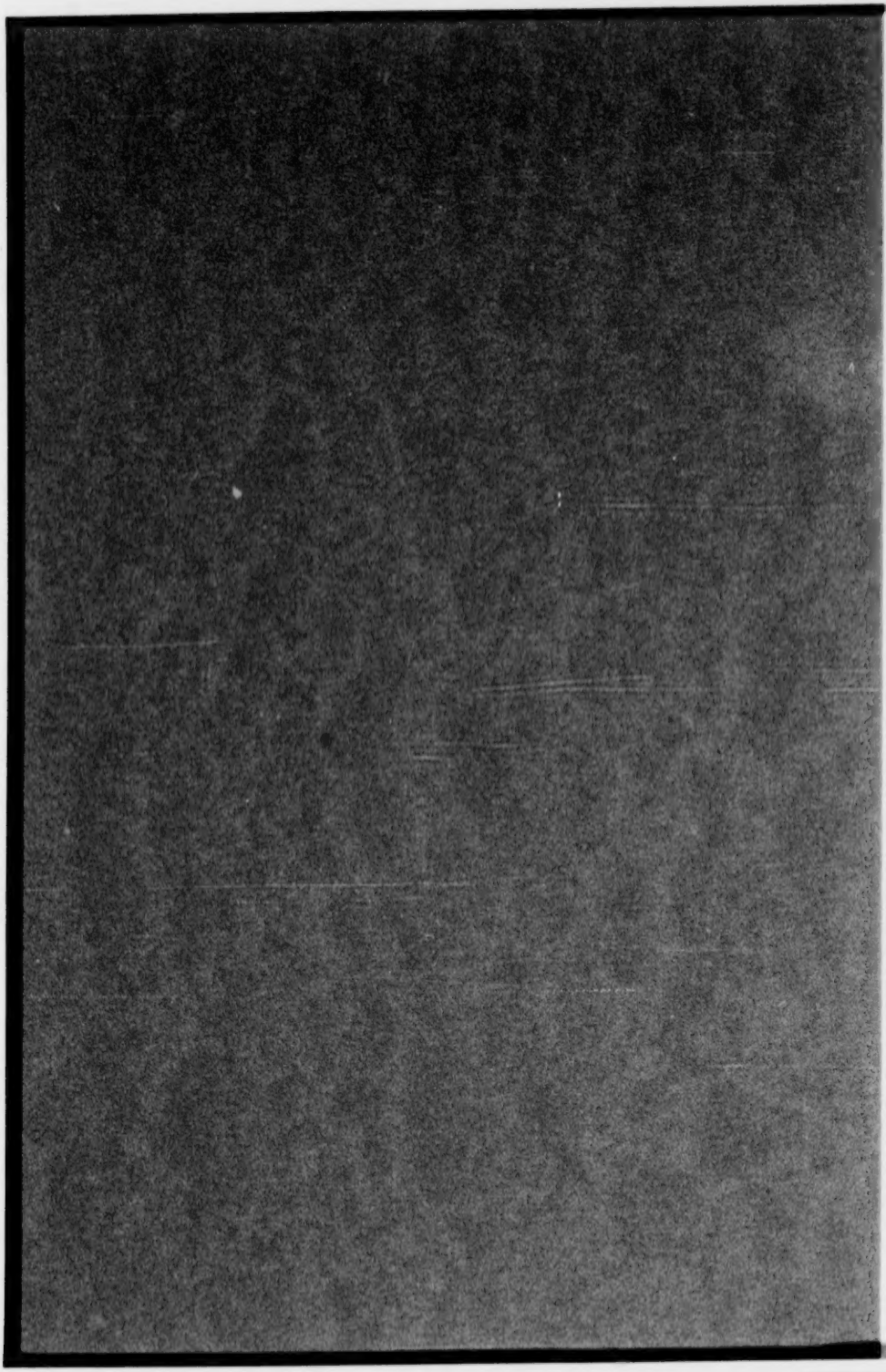
VII.

Conclusion.

In conclusion we urge the Court that the issues we have stated require important determinations concerning the interpretation of Chapter X and practice under it as well as a determination of the full significance of § 337, Internal Revenue Code. In addition to this, we have an important supervisory problem involving the Court of Appeals. Is the Court of Appeals to be required to follow the standards imposed on all other courts? On all of these grounds we submit that certiorari should be granted.

Respectfully submitted,

WILLIAM J. CURRER, JR.,
Counsel for Petitioner.



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APPENDIX 1.

Order Approving Report of Referee and Special Master re Application to Approve and Confirm Agreement of Compromise (H. J. Caruso). Application of Trustee for Authority to Sell Real Property and Application of Trustee for Authority to Make Lease With Brunswick Corporation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In the Matter of Wonderbowl, Inc., a California corporation, Wonderbowl-Downey, Inc., a California corporation, Debtors.

Filed: February 11, 1974.

This matter having come on for hearing on the "Report of Referee and Special Master re Application to Approve and Confirm Agreement of Compromise (H. J. Caruso), Application of Trustee for Authority to Sell Real Property and Application of Trustee for Authority to make Lease with Brunswick Corporation" December 17, 1973, at the hour of 9:00 A.M. thereof, and having been continued for hearing on January 7, 1974, at the hour of 9:00 A.M. thereof, and the Trustee having appeared by and been represented through his attorneys, MUNNS, KOFFORD, HOFFMAN, HUNT & THROCKMORTON, and C.E.H. McDONNELL and D. B. COMMONS by JOHN F. WATKINS, ESQ., and DAVID B. COMMONS, ESQ.; and BRUNSWICK CORPORATION having appeared and been represented by and through its attorneys VON HERZEN, CATLIN, REINJOHN & CLEMENS by GEORGE L. CATLIN, ESQ.; the debtors by ROBERT W. DRISCOLL, ESQ.; CARUSO INTERESTS by and through their attorneys SULMEYER, KUPETZ

& ALBERT by ARNOLD KUPETZ; shareholders of WONDERBOWL-DOWNEY, INC. by DAVID B. COMMONS, ESQ.; certain plan proponents by and through their attorneys SANDS, SCHAFFER, PACHTER, KAPLAN & GOLD by LEONARD SANDS; JAMES F. FALLON by and through his attorneys CURRER, KAYAIAN & KAKITA by WILLIAM J. CURRER, JR., ESQ.; UNION BANK by and through its attorneys COHEN, FREEDMAN & FELDMAN by LEE J. COHEN, ESQ.: SECURITIES & EXCHANGE COMMISSION by JAMES W. DUNLAP, ESQ.; and evidence both oral and documentary having been offered and received, and the court being fully advised in the premises,

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the "Application of Trustee for Approval of Sale of Real Property and of Agreement of Compromise, as Amended" be and the same hereby is approved.

2. That the "Application of Trustee to Approve and Confirm Agreement of Compromise (Caruso Enterprises, Inc., H. J. Caruso, James Fallon, et al.)" filed December 12, 1972, be and the same hereby is approved.

3. That the "Application for Authority to Sell Real Property and for Order Fixing Hearing and Form and Matter of Notice Thereof" filed January 3, 1973, be and the same hereby is approved.

4. That the "Application of Trustee for Authority to Make Lease with Brunswick Corporation" be and the same hereby is approved.

5. That the "Agreement of Compromise" with the "Amendment of Agreement of Compromise" be and the same hereby is confirmed.

6. That the Sale of the 21.32 acres and the Semon & Sisel leasehold interest and Bowen leasehold interest to Leong Woi Jing, or his nominee or assigns be and the same hereby is confirmed.

7. That the sale of the Anaheim Bowling Center to Brunswick Corporation according to the terms of the "Amendment of Agreement of Compromise" be and the same hereby is confirmed.

8. That the lease of the Wonderbowl-Downey, Inc. Bowling Center to Brunswick Corporation be and the same hereby is confirmed.

Dated: February 11, 1974.

DAVID W. WILLIAMS
JUDGE OF THE DISTRICT COURT

APPENDIX 2.

Opinion.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

In the Matter of Wonderbowl, Inc., a California corporation, Wonderbowl-Downey, Inc., a California corporation, Debtors. Alvin S. Bennett, Sheldon L. Pollack, Leonard S. Sands and Seymour Zucker and James L. Fallon, Appellants, v. Sam Jonas, Trustee, and H. J. Caruso, Brunswick Corporation, Appellees.

Filed: April 4, 1975.

Appeal From the United States District Court
For the Central District of California

Before: HUFSTEDLER, CHOY, and WALLACE, Circuit Judges

PER CURIAM:

The almost interminable litigation over the tangled affairs of Wonderbowl, Inc., and Wonderbowl-Downey, Inc., commenced when petitions for their reorganization were filed in 1967 under Chapter X of the Bankruptcy Act, is finally grinding to a close. Multiple lawsuits and hovering foreclosures prevented any feasible reorganization plan. Strenuous and prolonged efforts of the reorganization trustee, Jonas, ultimately resulted in sales, a lease, and compromises that together became the Amended Compromise approved by the district court. Everyone is satisfied, except appellants Bennett, Pollack, Sands, and Zucker, who directly proposed a plan to the court that was considered and rejected by the court, and appellant Fallon who was president of both corporations and who holds promotional stock in both. His stock at all times has

been subordinated to all common stock; he is precluded from participating in any distribution of either corporation's assets until the common stockholders have been repaid their full purchase price and all unpaid dividends.

We dismiss the appeals of Bennett, Pollack, Sands, and Zucker. In legal contemplation, they are strangers to the reorganization proceedings, and they have no standing to appeal. Pursuant to section 206 of the Bankruptcy Act (11 U.S.C. § 606), Fallon's stock ownership gives him standing. (*See Gleeson v. Carr* (9th Cir. 1955) 219 F.2d 64, 67.) That his subordinated position renders his stock worthless leads us to doubt whether the interests he seeks to vindicate are his own, but neither that fact nor our doubt deprives him of his status as a stockholder giving him standing to appeal.

Fallon's attempt to characterize the Amended Compromise as a plan of reorganization for the purpose of attacking it as a plan is a failure. These agreements are precisely what they purport to be—sales, a lease, and compromises. Packaging them together in the Amended Compromise does not alter their character. The reorganization trustee was fully empowered, with court approval, to sell, to lease, and to compromise within or without a reorganization plan. (*Daniel Hamm Drayage Co. v. Willson* (8th Cir. 1949) 178 F.2d 633; *Fernow v. Gubser* (10th Cir. 1943) 136 F.2d 971; *see In re V. Loewer's Gambrinus Brewery Co.* (2d Cir. 1944) 141 F.2d 747, 749; *Case v. Los Angeles Lumber Products Co.* (1939) 308 U.S. 106, 130; 6A Collier on Bankruptcy ¶¶ 8.06, 8.07, at 22-32 (J. Moore ed. 1972).) We have earlier criticized *In re Solar Mfg. Corp.* (3d Cir. 1949) 176 F.2d 493 (*In re Equity*

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Funding Corp. of America (9th Cir. 1974) 492 F.2d 793; *In re Wonderbowl Inc.* (9th Cir. 1970) 424 F.2d 178, 180), and we decline to follow it.

The court found that the estates were in danger of losing their assets and that the sales, lease, and compromises would benefit the estates of both corporations. The findings are amply supported by the record and are not clearly erroneous. The district court did not abuse its discretion in approving the Amended Compromise.

Fallon's claim is frivolous that Jonas had a conflict of interest.

AFFIRMED.

APPENDIX 3.

Order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of Wonderbowl, Inc., a California corporation, Wonderbowl-Downey, Inc., a California corporation, Debtors.

Alvin S. Bennett, Sheldon L. Pollack, Leonard S. Sands and Seymour Zucker and James L. Fallon, Appellants, v. Sam Jonas, Trustee, and H. J. Caruso, Brunswick Corporation, Appellees.

Filed: May 29, 1975.

Before: HUFSTEDLER, CHOY, and WALLACE, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX 4.

Sections of Title 11 USCA Applicable to This Case.

11 USCA § 516 (§ 166) provides:

"§ 516. *Same; additional jurisdiction over administration of estate*

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court

* * *

"(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; and . . ."

11 USCA § 567 (§ 167) provides:

"§ 567. *Powers and duties; trustee*

"The trustee upon his appointment and qualification—

* * *

"(5) shall at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate; and

"(6) shall give notice to the creditors and stockholders that they may submit to him suggestions for the

formulation of a plan, or proposals in the form of plans, within a time therein named."

11 USCA § 569 (§ 169) provides:

"§ 569. *Preparation, filing, and hearing on plan; trustee appointed*

"Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder."

11 USCA § 570 (§ 170) provides:

"§ 570. *Same; debtor continued in possession*

"Where a debtor is continued in possession, a plan or plans may be filed, within a time fixed by the judge—

"(1) by the debtor;

"(2) by any creditor or indenture trustee;

"(3) by any stockholder, if the debtor is not found to be insolvent;

"(4) by the examiner, if so directed by the judge. The judge shall fix a subsequent time for a hearing on such plans and for the consideration of any objections or amendments thereto."

11 USCA § 571 (§ 171) provides:

"§571. *Notice and time of hearing on plan*

"Notice of the time of any hearing, as provided in section 569 or section 570 of this title, shall be given

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to the debtor, the creditors and stockholders, the indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the court may designate. The judge may, upon the application of the trustee, any creditor, indenture trustee, or stockholder, advance the time of such hearing."

11 USCA § 573 (§ 173) provides:

"§ 573. *Approval of plan; order to await report of Commission*

"The judge shall not enter an order approving a plan submitted to the Securities and Exchange Commission until after the Securities and Exchange Commission has filed its report thereon or has notified the judge that it will not file a report, or until the expiration of such reasonable time for the filing of such report as the judge has fixed, whichever first occurs."

11 USCA § 574 (§ 174) provides:

"§ 574. *Same; entry of order and fixing time for acceptance of plan*

"After the hearing, as provided in section 569 or section 570 of this title, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in section 572 of this title, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 616 of this title, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same."

11 USCA § 575 (§ 175) provides:

"§ 575. *Submission of information to creditors and stockholders after approval*

"Upon the approval of a plan by the judge, the trustee or the debtor in possession shall transmit, by mail or otherwise, to all creditors and stockholders who are affected by any such plan—

"(1) the plan or plans so approved, together with a summary thereof approved by the judge;

"(2) the opinion of the judge, if any, approving the plan, or plans, or a summary thereof approved by the judge;

"(3) the report, if any, filed in the proceeding by the Securities and Exchange Commission, as provided in section 572 of this title, or a summary thereof prepared by the Securities and Exchange Commission; and

"(4) such other matters as the judge may deem necessary or desirable for the information of creditors and stockholders."

11 USCA § 576 (§ 176) provides:

"§ 576. *Soliciting acceptance of plan before order of approval*

"No person shall, without the consent of the court, solicit any acceptance, conditional or unconditional, of any plan, or any authority, conditional or unconditional, to accept any plan, whether by proxy, deposit, power of attorney or otherwise, until after the entry of an order approving such plan and the transmittal thereof to the creditors and stockholders, as provided in section 575 of this title; and any such authority or acceptance given, procured, or received by reason of a

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solicitation prior to such approval and transmittal shall be invalid, unless such consent of the court has been so obtained."

11 USCA § 579 (§ 179) provides:

"§ 579. *Acceptance of plan; hearing for confirmation*

"After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 603 of this title, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 616 of this title, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation."

11 USCA § 580 (§ 180) provides:

"§ 580. *Same; effect of order of approval on right to object to confirmation*

"The order of the judge approving a plan, as provided in section 574 of this title, shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan."

11 USCA § 596 (§ 196) provides:

"§ 596. *Filing and allowing proofs of claims; objections to allowances*

"After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claims of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court."

11 USCA § 603 (§ 203) provides:

"§ 603. *Disqualification of votes on acceptance in absence of good faith*

"If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan."

11 USCA § 606 (§ 206) provides:

"§ 606. *Persons entitled to hearings*

"The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

11 USCA § 607 (§ 207) provides:

"§ 607. *Intervention of parties; notices generally*

"The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given."

11 USCA § 609 (§ 209) provides:

"§ 609. *Representation in proceedings*

"Any creditor or stockholder may in a proceeding under this chapter act in person, by an attorney at law, or by a duly authorized agent or committee."

11 USCA § 610 (§ 210) provides:

"§ 610. *Same; statement by attorney*

"An attorney for creditors or stockholders shall not be heard unless he has first filed with the court a statement setting forth the names and addresses of such creditors or stockholders, the nature and amounts of their claims or stock, and the time of acquisition thereof, except as to claims or stock alleged to have been acquired more than one year prior to the filing of the petition."

11 USCA § 611 (§ 211) provides:

"§ 611. *Same; statement by committees, etc., and indenture trustees*

"Every person or committee, representing more than twelve creditors or stockholders, and every indenture

trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include—

"(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

"(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act;

"(3) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the proceeding of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof; and

"(4) a showing of the claims or stock represented by such person or committee and the respective amounts thereof, with an averment that each holder of such claims or stock acquired them at least one year before the filing of the petition or with a showing of the times of acquisition thereof."

11 USCA § 616 (§ 216) provides:

"§ 616. *Provisions of plan*

"A plan of reorganization under this chapter—

"(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may

include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

"(2) may deal with all or any part of the property of the debtor;

"(3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge;

"(4) may provide for the rejection of any executory contract except contracts in the public authority;

"(5) shall specify what claims, if any, are to be paid in cash in full;

"(6) shall specify the creditors or stockholders or any class of them not to be affected by the plan and the provisions, if any, with respect to them;

"(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;

"(8) shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the majority of the stock required under this chapter, adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan, either as provided in the plan or in the order confirming the plan, (a) by the sale of such property at not less than a fair upset price; or (b) by appraisal and payment in cash of the value of their stock; or (c) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection: *Provided, however,* That such protection shall not be required if the judge shall determine that the debtor is insolvent;

"(9) may include, where any indebtness is created or extended under the plan for a period of more than five years, provisions for the retirement of such indebtedness by stated or determinable payments out of a sinking fund or otherwise, (a) if secured, within the expected useful life of the security therefor, or (b) if unsecured, or if the expected useful life of the security is not fairly ascertainable, then within a specified reasonable time, not to exceed forty years;

"(10) shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset

price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; the satisfaction or modification of liens; the cancellation or modification of indentures or of other similar instruments; the curing or waiver of defaults; the extension of maturity dates and changes in interest rates and other terms of outstanding securities; the amendment of the charter of the debtor; the issuance of securities of the debtor or such other corporations for cash, for property, in exchange for existing securities, in satisfaction of claims or stock or for other appropriate purposes;

"(11) shall include provisions which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy, with respect to the manner of selection of the persons who are to be directors, officers, or voting trustees, if any, upon the consummation of the plan, and their respective successors;

"(12) shall provide for the inclusion in the charter of the debtor, or any corporation organized or to be organized for the purpose of carrying out the plan, of—

"(a) provisions prohibiting the debtor or such corporation from issuing non-voting stock, and providing, as to the several classes of securities of the debtor or of such corporation possessing voting power, for the fair and equitable distribution of such power among such classes, including, in the case of any class of stock having a preference over other stock with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

"(b) (1) provisions which are fair and equitable and in accordance with sound business and accounting practice, with respect to the terms, position, rights, and privileges of the several classes of securities of the debtor or of such corporation, including, without limiting the generality of the foregoing, provisions with respect to the issuance, acquisition, purchase, retirement or redemption of any such securities, and the declaration and payment of dividends thereon; and (2) in the case of a debtor whose indebtedness, liquidated as to amount and not contingent as to liability, is $250,000 or over, provisions with respect to the making, not less than once annually, of periodic reports to security holders which shall include profit and loss statements and balance sheets prepared in accordance with sound business and accounting practice;

"(13) may include provisions for the settlement or adjustment of claims belonging to the debtor or to the estate; and shall provide, as to such claims not settled or adjusted in the plan, for their retention and enforcement by the trustee or, if the debtor has been continued in possession, by an examiner appointed for that purpose; and

"(14) may include any other appropriate provisions not inconsistent with the provisions of this chapter."

11 USCA § 621 (§ 221) provides:

"§ 621. *Confirmation by court*

"The judge shall confirm a plan if satisfied that—

"(1) the provisions of subchapter VII, section 599, and subchapter X of this chapter have been complied with;

"(2) the plan is fair and equitable, and feasible;

"(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means of promises forbidden by this title;

"(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

"(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy."

Sections of Title 26 USCA Applicable in This Case.

26 USCA § 337 provides:

"§ 337. *Gain or loss on sales or exchanges in connection with certain liquidations*

"(a) General rule.—If—

"(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

"(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation,

less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

"(b) Property defined.—

"(1) In general.—For purposes of subsection (a), the term 'property' does not include—

"(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business,

"(B) installment obligations acquired in respect of the sale or exchange (without regard to whether such sale or exchange occurred before, on, or after the date of the adoption of the plan referred to in subsection (a)) of stock in trade or other property described in subparagraph (A) of this paragraph, and

"(C) installment obligations acquired in respect of property (other than property described in subparagraph (A)) sold or exchanged before the date of the adoption of such plan of liquidation.

"(2) Nonrecognition with respect to inventory in certain cases.—Nowithstanding paragraph (1) of this subsection, if substantially all of the property described in subparagraph (A) of such paragraph (1) which is attributable to a trade or business of the corporation is, in accordance with this section, sold or exchanged to one person in one transaction, then for purposes of subsection (a) the term 'property' includes—

"(A) such property so sold or exchanged, and

"(B) installment obligations acquired in respect of such sale or exchange.

"(c) Limitations.—

"(1) Collapsible corporations and liquidations to which section 333 applies.—This section shall not apply to any sale or exchange—

"(A) made by a collapsible corporation (as defined in section 341(b)), or

"(B) following the adoption of a plan of complete liquidation, if section 333 applies with respect to such liquidation.

"(2) Liquidations to which section 332 applies.—In the case of a sale or exchange following the adoption of a plan of complete liquidation, if section 332 applies with respect to such liquidation, then—

"(A) if the basis of the property of the liquidating corporation in the hands of the distributee is determined under section 334(b) (1), this section shall not apply; or

"(B) if the basis of the property of the liquidating corporation in the hands of the distributee is determined under section 334(b) (2), this section shall apply only to that portion (if any) of the gain which is not greater than the excess of (i) that portion of the adjusted basis (adjusted for any adjustment required under the second sentence of section 334(b) (2)) of the stock of the liquidating corporation which is allocable, under regulations prescribed by the Secretary or his delegate, to the property sold or exchanged, over (ii) the adjusted basis, in the hands of the liquidating corporation, of the property sold or exchanged.

"(d) Special rule for certain minority shareholders. —If a corporation adopts a plan of complete liquidation on or after January 1, 1958, and if subsection (a) does not apply to sales or exchanges of property by such corporation, solely by reason of the application of subsection (c) (2) (A), then for the first taxable year of any shareholder (other than a corporation which meets the 80 percent stock ownership requirement specified in section 332(b) (1)) in which he receives a distribution in complete liquidation—

"(1) the amount realized by such shareholder on the distribution shall be increased by his proportionate share of the amount by which the tax imposed by this subtitle on such corporation would have been reduced if subsection (c) (2) (A) had not been applicable, and

"(2) for purposes of this title, such shareholder shall be deemed to have paid, on the last day prescribed by law for the payment of the tax imposed by this subtitle on such shareholder for such taxable years, an amount of tax equal to the amount of the increase described in paragraph (1)."

APPENDIX 5.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In the Matter of Wonderbowl, Inc., a California corporation, Debtor,

Union Bank, Applicant-Appellant, vs. George T. Goggin, Trustee-Appellee. No. 73-2337.

[January 19, 1973]

Appeal from the United States District Court for the Central District of California

Before: HUFSTEDLER and CHOY, Circuit Judges, and SWEIGERT,* District Judge

PER CURIAM:

The foundation for the district court's order of May 24, 1971, denying Union Bank's application to foreclose its deed of trust, was its assumption that Wrather could be compelled to purchase the encumbered property for $3,277,680. The assumption was erroneous. (*In re Wonderbowl, Inc.* (9th Cir. 1972) 460 F.2d 1220.) When that foundation collapsed, the order fell with it.

REVERSED.

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*Honorable William T. Sweigert, United States Judge for the Northern District of California, sitting by designation.